# No. 15,245

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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UNITED STATES OF AMERICA,
*Appellant,*

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, doing business under the firm name and style or Yuba City Livestock Auction Company,
*Appellees.*

**On Appeal from the United States District Court for the Northern District of California, Northern Division.**

## BRIEF FOR APPELLEES.

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## Subject Index


| | Page |
|---|---|
| Jurisdictional statement | 1 |
| Statement of the case | 1 |
| Argument | 2 |
| (a) Appellees had no notice of appellant's mortgage | 3 |
| (b) Damage to the government from the auction company's activities has not been shown | 8 |


## Table of Authorities Cited

### Cases


| | Pages |
|---|---|
| Blackwell v. Laird, 163 S.W. (2d) 91 (1942) | 13 |
| Drover's Cattle Loan and Investment Company v. Rice, 10 Fed. (2d) 510 | 12, 15 |
| Frizzell v. Rundel, 12 S.W. 918 | 12 |
| Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp., 1 Cal. (2d) 121 | 15 |
| Mason City Production Credit Assn. v. Ellingson, 286 N.W. 713 | 14 |
| Swim v. Wilson, 90 Cal. 126 | 14, 15 |
| United States v. Butt, 203 Fed. (2d) 644 | 13 |


### Codes


| | |
|---|---|
| California Civil Code: | |
| Section 2957 | 8 |
| Section 3527 | 12 |

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### JURISDICTIONAL STATEMENT.

For the reasons and upon the authorities cited by Appellant (pp. 1-2 of Appellant's Brief) the jurisdictional statement of Appellant is accepted by Appellees as correct.

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### STATEMENT OF THE CASE.

Appellant's statement of the case is accepted as correct excepting for the statement set forth in the

second paragraph on page 3 of Appellant's Brief to the effect that Wheaton's debt to Appellant is still due and owing in a sum exceeding $1,526.22 and cannot be satisfied out of Wheaton's current assets.

Wheaton's debt at the time of the trial was very much less than $1,526.22 (R. 53-54-56) and could have been satisfied out of Wheaton's remaining personal property subject to the mortgage. The details pertaining to our assertions contained in this paragraph are hereinafter discussed.

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**ARGUMENT.**

Since the opinion of the learned trial Judge has been printed in the record (R. 10 through 27) for avoidance of repetition we shall, by reference, incorporate it in this brief and with the additional matter hereinafter set forth, use it and the authorities therein cited in support of the two important elements of the case, namely,—

1. That a sufficient basis does not exist either in law or in fact for holding Appellees liable to Appellant for conversion.

3. That the case should be decided in accordance with Federal rather than local law.

Point No. 2 requires no further discussion herein. We should like to present a topical review of the matters which we have in mind with reference to No. 1:

**(a) Appellees Had No Notice of Appellant's Mortgage.**

Wheaton's mortgage to the Government (Plaintiff's Exhibit 1) covered:

1. Crops grown and to be grown on Wheaton's ranch until full payment of his indebtedness.

2. Two thousand chickens.

3. Seventeen hogs, including the increase.

4. Five cattle, including the increase.

5. All livestock and personal property subsequently acquired by mortagor during the continuance of the mortgage.

6. Farm equipment, machinery, tools and other farm personal property including an irrigation pumping plant.

Subsequently he bought from one Fritz Ruff one hundred twenty hogs (R. 42-43) and mortgaged them back to Mr. Ruff (R. 43-45) (Defendants' Exhibit B) to secure the purchase price of $7500.00. Ruff's mortgage shows that it was duly recorded in Yuba County (R. 43-45).

Wheaton took the Ruff hogs to his ranch in Yuba County and commingled them with the hogs already there (R. 46).

Subsequently to the Ruff deal he acquired from some other source another herd of forty-two hogs (R. 42) and brought them to his said ranch where they likewise were commingled with the hogs already there.

So far as the record discloses there were no markings or identifying characteristics that would distinguish what we shall call the Ruff hogs from the Government hogs.

From the herd of hogs thus assembled by Wheaton
17 head on the ranch when the Government mortgage was made,
120 head subsequently acquired from Ruff,
42 head subsequently acquired from some other source, plus their increase,
the few hogs involved in Wheaton's improper sales were presented to Yuba City Livestock Auction Company at its place of business at Yuba City in Sutter County, California, for sale in the ordinary course of business, were guaranteed in writing by Wheaton to be free of liens, mortgages and other encumbrances (R. 9-49) and the sales were made in job lots over the period November 19, 1951 to March 2, 1953, inclusive, which brewed this controversy.

We say this,—that Appellees could not have determined by the most searching scrutiny of the recorded mortgages whether the hogs presented for sale were Ruff's hogs or the Government's hogs.

The Government cannot claim a lien on the Ruff hogs under the after acquired property clause of its mortgage that would take precedence over Mr. Ruff's rights because in any event he, Ruff, would have a vendor's lien to secure his sale price that would take first position. To say that Appellees, considering both mortgages, should have impounded the proceeds and sued in interpleader to find the rightful owner of the

funds is to argue an absurdity since the hogs were sold a hog or two at a time over a period exceeding one and one-fourth years.

It is a very rational observation that not even Wheaton could have said for a certainty to which mortgage the hogs belonged.

As a matter of reproduction hogs are prolific. The very authoritative book by Prof. William W. Smith, Professor of Animal Husbandry, Purdue University, entitle "Pork Production" (1937) MacMillan, furnishes the following data:

In brood sows the period of gestation is 114 days (p. 13).

Sows are ready for breeding within a matter of days after farrowing (p. 12).

The average size of the litters, 6 to 11 pigs (pp. 101-102).

Pigs grow rapidly (pp. 98-99-136). A pig will develop into a 150 lb. hog in approximately 200 days from birth (p. 143).

A gilt is ready for breeding at from 7 to 10 months of age (p. 14).

Thus, reasonable attention by the hog raiser, plus the processes of nature would produce an astounding multiplication in the herd during the period from the date of the Government mortgage to and including the period of the questioned sales. Commingling of the three lots to form one blended herd, plus the fact that progeny of the resulting herd would become mature, marketable hogs during the period when the

facts of the case arose add to a confusing situation where no one could tell from a later study of the two recorded mortgages which were whose hogs. This would be particularly true with respect to the hogs separated from the herd and presented by Wheaton at the auction premises of Appellees in another county for sale.

Concede that Wheaton testified on direct examination that most of the sales were made from the forty-two head, how was the auction company to know or to learn that from any inspection of the records. The trial Judge commented (R. 49), "How is the auction company going to differentiate between hogs." It will be noted that the Judge, with impatience, halted the trial during our cross-examination of Wheaton (R. 47), foreclosing us of the opportunity to go into several questions important to our defense, one of which was his identification of the hogs sold. So much for the hogs.

Appellees are charged with converting one 90 pound lamb. Sheep are not mentioned in the mortgage excepting by inference under the language purporting to make the mortgage a lien on subsequently acquired livestock. This is not to our thinking sufficient to charge Appellees with constructive notice that a hog and chicken farmer might, unannounced and unexpectedly, switch over to sheep growing. Even though we be wrong, the value of the lamb as a separate item is neither alleged nor proven.

As to cows, two are mentioned in the mortgage. The record indicates the Government has received settle-

ment for four (testimony of A. W. Wheaton, R. 42). This, if true, would eliminate any possibility of conversion of any cattle. However, in the interest of a forthright presentation of this case, this could be a typing error of the reporter. Possibly the word "sows" is intended. The context would so indicate and the writer's trial notes shed no light on the matter. However, the Government now admits it has received settlement from Wheaton for one cow (Appellant's Brief, footnote page 32). Appellees did not participate in this settlement and knew nothing about it prior to reading Appellant's brief.

The value of the one remaining cow claimed to have been converted appears, from the record, to have been $276.07 (R. 5).

It was found by the Court below that Appellees did not have notice of Appellant's mortgage during the relevant period (R. 30). That is definitely the case so far as actual notice is concerned. The question of its materiality aside, the thing that here engages our attention is whether the fact of recordation in another county was sufficient to impart constructive notice under the established facts. We have discussed the confused and conflicting status of the record so far as hogs are concerned. We have shown that we received a lamb—one lamb—from Wheaton for sale, whereas sheep are not mentioned in the Government's mortgage and while language is included therein serving to disclose his interest in hogs principally, cattle very slightly, there is nothing whatsoever to alert anyone to the possibility that he might also be in-

terested in sheep. Furthermore, as stated in the opinion (R. 13), the California recording statute, Civil Code, Section 2957, is applicable by its expressed terms to creditors of the mortgagor and subsequent purchasers and encumbrancers of the property; and has been uniformly held not to apply to auctioneers who neither have nor claim a property interest in the goods.

Upon the basis of the foregoing discussion and calling the Court's attention to Judge Murphy's cited authorities (R. 13-14) the question of notice should be resolved in Appellees' favor.

**(b) Damage to the Government From the Auction Company's Activities Has Not Been Shown.**

Of all the property included under Wheaton's mortgage (supra page 3) the mortgaged crops have not been realized on, nor the chickens, nor the farm equipment, nor the replacements thereof, nor the increase of the livestock. At the trial at Sacramento we had a witness present who would have testified that on the day preceding the trial Wheaton owned and actually had on his ranch more livestock than was on hand when the Government's mortgage was made, to wit:

19 hogs of 150 lbs. each or better,
9 brood sows,
30 weaners,
1 cow,
9 calves,
1 pumping plant worth $800.00 or more,

the total fair value of which would be considerably in excess of the balance Wheaton owed the Govern-

ment (see note). Further questions as to the balance will be hereinafter discussed.

The record discloses no effort by Appellant to collect from Wheaton on all or any of the remaining security. A judgment in a conversion action is a judgment for damages. The Government has not yet proven that it has been damaged. Not unless and until the Government shall have foreclosed its mortgage and actually sustained some loss after realizing on its remaining security, should any thought be given to holding Appellees for any damages resulting to the Government from the sales of livestock involved herein. To hold otherwise would do violence to the ordinary principles of justice. The Farmers' Home Administration, the Federal agency involved in this case, should not enjoy any indulgences from the Court because of its own negligence. Admittedly the Farmers' Home Administration was organized to make government loans to borrowers of impaired credit (Appellant's Brief 25-26). Wheaton qualified for such a loan. Knowledge that the credit of its borrower was weak will be presumed against Farmers' Home Administration, yet with a district office and an organization here in Yuba City (R. 52) there is no evidence of any supervisory activities or of any checkup on Wheaton on the security over the long period during which the facts of the case developed. Then after the long period of job

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(NOTE): Due to the abrupt termination of the trial this evidence was not introduced. The Court remarked that our answer would be deemed to be true from which we assume it proper to discuss the probative facts which support the ultimate facts set forth in the denials and averments of the answer. Furthermore, counsel for the Government argue outside the record in their brief (pp. 25-27) and we assume that we are entitled to the same latitude.

lot sales involved herein the Government moved in on the auction company, bringing to the latter the first actual notice of the existence of the mortgage. Thereafter when the auction company sold any livestock for Wheaton it paid the proceeds to the Government (R. 53-54-56-57-59). At least three such payments were made, one for $173.95 (R. 53); one for $228.35 (R. 56); and one for $315.12 (R. 56). The $173.95 payment appears to have been credited (R. 53) to Wheaton's account. The check for the $228.35 payment was lost by the Farmers' Home Administration and the auction company issued and delivered a duplicate (R. 54) which had not been credited at the time of the trial. The check of $315.12 paid to the F. H. A. under date November 22, 1954, had not been returned through bank channels at the time of the trial, approximately one year later (R. 56-57), nor is there any recognizable evidence that it has been credited to Wheaton's account. Any shortcomings with reference to it rest on F. H. A. and not on Appellees. The Sutter County supervisor for F. H. A. testified that at the time of the trial there remained unpaid on Wheaton's mortgage:

| | | |
|---|---|---|
| Principal balance | | $1,861.42 |
| Interest | | 106.42 |
| Total (R. 53.) | | $1,967.84 |
| With the further reduction by the two uncredited payments made by Appellees | $228.25 | |
| | 315.12 | 543.47 |
| The net unpaid balance becomes | | $1,424.37 |

Now counsel for Appellant in their brief (footnote p. 32) acknowledge for the first time, so far as we know, that Wheaton is entitled to further credit for $280.92 for a transaction dating back to 1951 and not yet credited to Wheaton's account at the time of the trial in 1955. This further reduction serves to reduce the unpaid balance to $1143.45. Thus a judgment favorable to the Appellant would wipe out Wheaton's remaining debt. Wheaton would become entitled to a full satisfaction of his mortgage and would be free to go his way with the remaining property described in the mortgage completely unencumbered. A lethargic Government agency characterized by inertia and haphazard business methods would be made whole by having turned against innocent parties —Appellees—who did more, once they had notice of the mortgage, to take care of the agency's interest than did the agency itself. These were the aspects of the case that caused the trial Judge to scold the Department of Justice so vehemently for having instituted the action (R. 47, 58), particularly on Page 58, where the Court commented, "I think it is perfectly ridiculous for the Government to pursue the prosecution of a case of this character. I am not criticising you, Mr. Eddy (the Assistant United States Attorney conducting the trial), I know that you have to take your orders, but I don't (think) that this is the kind of case that should be brought to the United States District Court."

A legitimate concern for the proper use and safeguarding of public funds is to be commended but such can be done and could have been done in this

case by a procedure—foreclosure of Wheaton's mortgage—which would have maintained a higher moral tone than this procedure against Appellees.

We have seldom seen a case where the maxim of jurisprudence "The law helps the vigilant before those who sleep on their rights," California Civil Code, Section 3527, could have better application than in this case.

Out of consideration for the matters discussed in the foregoing topical review of some of the aspects of the case, the learned Judge of the Court below, while awarding a nominal judgment to plaintiff decided the case in a manner satisfactory and acceptable to Appellees.

As stated in an early paragraph of this brief, his opinion and the authorities therein cited in support of the decision are by reference incorporated herein and are relied on by us.

We refer particularly to *Drover's Cattle Loan and Investment Company v. Rice,* 10 Fed. (2d) 510, which followed the earlier case of *Frizzell v. Rundel,* 12 S.W. 918, holding the commission merchant not responsible to the mortgagee in the absence of actual notice of the lien, to be more aptly applicable to the case at bar, considering all the facts and circumstances of the case, than the authorities cited by counsel for Appellant, to support their argument for a reversal. In *Drover's* on page 513, the Court said, after weighing the considerations both ways *"Upon*

*the whole record* I am of the opinion that plaintiff has failed to state a cause of action and that the action should be dismissed." Emphasis added.

In *United States v. Butt,* 203 Fed. (2d) 644, cited by Appellant (Appellant's Brief page 17) the Court by way of dictum said, "Generally a mortgagee *who has suffered loss* may maintain an action against a person who has wrongfully converted to his own uses property included under the mortgage." Emphasis added.

In the case at bar no loss has thus far been shown to have resulted from the activities of Appellees. Appellant still has security unquestionably ample to secure its balance.

The case of *Blackwell v. Laird,* 163 S.W. (2d) 91 (1942) cited by counsel for Appellant in their brief at page 19, furnishes material support to our position. This was an action by Felix G. Blackwell against John M. Laird and G. Thomas Laird, doing business under the name of Laird Brothers Live Stock Commission Company, to recover the value of cattle which were allegedly stolen from the plaintiff by a farm hand, and sold to livestock traders who consigned the cattle to the defendants. From a judgment in favor of the defendants, the plaintiff appealed.

The respondents pleaded and urged by way of defense, that under the "Packers and Stockyards Act" they were required to render market service to all persons applying for such service, and promptly re-

ceive and sell for a commission, without discrimination, all livestock consigned to them for sale and to immediately account to the consignors of said livestock for the proceeds of such sales; that the business of respondents under said Act was a "public utility," and that the operator of a public utility must render service to all who apply for the same, absent actual notice that an applicant was legally not entitled to same.

The sole question presented was whether the respondents, as sellers of stolen cattle, are liable to the appellant, as owner, for their value, even though respondents had no notice or knowledge of appellant's interest in said cattle.

The judgment was affirmed.

Appellant argued that the Court should follow the decision of the Supreme Court of Minnesota in the case of *Mason City Production Credit Assn. v. Ellingson,* 286 N.W. 713, wherein the Court construed the Packers and Stockyards Act and held that while the defendant in that case was a "market agency" under the Act, nevertheless when it sold mortgaged property delivered to it by the mortgagor, it was liable to the mortgagee in conversion even though it had no knowledge of the mortgage.

The Court ruled that the decision of the Minnesota Court while persuasive, was not binding.

We call the Court's attention to the fact that in the California cases cited by Appellant, *Swim v. Wil-*

*son,* 90 Cal. 126, and *Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp.,* 1 Cal. (2d) 121, *mortgaged* property is not involved. In *Swim v. Wilson* the property was *stolen.* In the *Lusitanian-American* it had been sold under a *conditional contract of sale.* A distinction between those cases and the one at bar will be readily discerned. In the *conditional contract of sale case* and in the *stolen* property case, the true owner's property is wrested from him and he suffers actual ascertainable loss. In this chattel mortgage case the mortgagee—the holder of a special interest for security only, rather than the true owner—sues to recover damages for an imaginary loss, not a real one. No loss is shown or proven unless all the security is sold or so far depleted that recovery from the remainder is impossible.

As we approach the conclusion of this discussion we pause to ponder the so-called general rule for the application of which to this case counsel for Appellant argue in their brief. We see it as a rule which has become so shot through by decisions holding to the contrary that its efficacy as a yardstick stands discredited. Reviewing the cases on a nationwide basis one finds here a case where the so-called rule has been applied and there one where it has been rejected. To us it all adds up to a situation where, as was said by the Court in the *Drover's Cattle Loan* case, supra, the Court will apply or reject it as appears befitting in each separate case upon consideration of the whole record thereof. So saying and be-

lieving we respectfully urge that upon study and consideration of the whole record on this appeal the judgment of the District Court should be affirmed.

Dated, Yuba City, California,

March 14, 1957.

Respectfully submitted,

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